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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

 Plaintiff,

 vs.

JAMES ARTHUR RAY,

 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
MOTION TO EXCLUDE IMPROPER
EVIDENCE FROM PRE-SENTENCING
HEARING**

SUPERIOR COURT
YAVAPAI COUNTY
2011 SEP 14 AM 11:55
SARAH K. TINKER, CLERK
BY: Kelly Gresham

1 **I. ARGUMENT**

2 In its 59th Supplemental disclosure on September 12, 2011, the State identified numerous
3 letters that it apparently intends to introduce at the pre-sentencing hearing. These letters are
4 improper at this stage, for they do not constitute rebuttal evidence—they are not relevant to the
5 character of mitigation witnesses, and they do not rebut specific mitigation facts. In addition, the
6 letters are unfairly prejudicial and lack indicia of reliability. They should be stricken.

7 **A. Providing the State a *Second* Aggravation Hearing Would Violate the Due**
8 **Process Clause.**

9 The upcoming pre-sentencing hearing must be restricted to mitigation evidence and to
10 focused rebuttal. Permitting the State instead to put on a second aggravation hearing would
11 run afoul of the Due Process Clause, which requires that sentencing proceedings comport with
12 fundamental fairness. *See, e.g., State v. Hampton*, 213 Ariz. 167, 179 (2006); *see generally*
13 *Payne v. Tennessee*, 501 U.S. 808, 825, (1991) (holding that unfairly prejudicial evidence may
14 be excluded if it renders the proceeding “fundamentally unfair”). The prosecution already put
15 forth its aggravation evidence during the three-day aggravation hearing that concluded on June
16 30. At that hearing, the State introduced live witness testimony and made opening and closing
17 arguments. The jury ultimately found the State had proven only one aggravator. It would be
18 fundamentally unfair to permit the State a *second* turn at proving aggravating circumstances—
19 to submit to the Judge the evidence and arguments that it did not wish to make to the jury, or
20 that were unsuccessful before the jury. Moreover, such a duplicate aggravation hearing would
21 serve no legitimate purpose; under *Blakely v. Washington* and its progeny, the Sixth Amendment
22 prohibits this Court from finding additional aggravating circumstances that would increase Mr.
23 Ray’s maximum sentence.

24 At a minimum, to the extent there is any ambiguity in Arizona’s criminal statutes and
25 rules regarding aggravation proceedings, they must be construed to avoid the potential unfairness
26 that would arise from a second aggravation hearing, *see, e.g., Clark v. Martinez*, 543 U.S.
27 371, 381–82 (2005) (the “canon of constitutional avoidance” is “a tool for choosing between
28

1 competing plausible interpretations of a statutory text, resting on the reasonable presumption that
2 [the legislature] did not intend the alternative which raises serious constitutional doubts.”), and
3 must also be construed consistent with the rule of lenity, *see, e.g., Reinesto v. Superior Court*, 182
4 Ariz. 190, 192 (App. 1995) (“[T]he rule of lenity requires us to resolve any ambiguity in favor of
5 the defendant.”). For these reasons, the State cannot be permitted a second aggravation hearing,
6 and its evidence at the upcoming pre-sentencing hearing must be limited to legitimate rebuttal
7 evidence that bears on specific mitigation facts.

8 **B. The Evidence The State Has Disclosed Must Be Excluded Because It Is**
9 **Irrelevant to Mitigation, Unfairly Prejudicial, and Unreliable.**

10 1. This Court Must Exclude Evidence That Is Irrelevant and Prejudicial.

11 Evidence introduced at sentencing must be relevant and must not be unfairly
12 prejudicial. “A judge’s analysis in determining the relevance of rebuttal evidence involves
13 fundamentally the same considerations as relevance and prejudice determinations under Arizona
14 Rules of Evidence 401 and 403.” *State v. Pandeli*, 215 Ariz. 514, 527–28 (2007). The question
15 the Court must ask is whether the evidence is properly considered rebuttal. Only evidence that
16 directly impeaches the credibility of Mr. Ray’s mitigation witnesses or rebuts specific mitigation
17 facts is permissible at this stage.

18 The Arizona Supreme Court has emphasized the need for the trial court to exercise its
19 authority to exclude irrelevant evidence: “*Trial courts should not allow the penalty phase to*
20 *devolve into a limitless and standardless assault on the defendant’s character and history.*
21 Rather, trial judges should exercise their broad discretion in evaluating the relevance of such . . .
22 evidence to any mitigation evidence offered.” *Hampton*, 213 Ariz. at 180 (emphasis added).
23 “Trial courts *can and should* exclude evidence that is either irrelevant to the thrust of the
24 defendant’s mitigation or otherwise unfairly prejudicial.” *Id.* (emphasis added).

25 The letters the State intends to introduce at the pre-sentencing hearing fall short of these
26 standards. Indeed, upon information and belief, some of the declarants—including Joshua Galle,
27 Brooke Kirkland, and Mary Latallade—have never met Mr. Ray and never attended JRI events.
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1 These individuals plainly are not qualified to rebut the mitigating circumstances the Defense will
2 present regarding Mr. Ray's character.

3 2. This Court Must Exclude Evidence That Lacks Indicia of Reliability.

4 "The Due Process Clause of the Fourteenth Amendment . . . places limitations on rebuttal
5 evidence" introduced at a pre-sentencing hearing. *Pandeli*, 215 Ariz. at 527. Indeed, although
6 the rules of evidence do not apply fully at the hearing, both the Due Process Clause and Arizona
7 law require that evidence submitted the hearing bear indicia of reliability. *See* Ariz. R. Crim. P.
8 26.7 (at the pre-sentencing hearing, the parties "may introduce any *reliable, relevant evidence*,
9 including hearsay, in order to show aggravating or mitigating circumstances" (emphasis added));
10 *State v. McGill*, 213 Ariz. 147, 160 (Ariz. 2006) ("hearsay testimony must have sufficient indicia
11 of reliability to be responsible evidence"); *State v. Hampton*, 213 Ariz. 167, 179 (2006) ("the Due
12 Process Clause also demands that hearsay statements contain sufficient indicia of reliability"). *See*
13 *also State v. Donahoe*, 118 Ariz. 37, 44 (App. 1977) (detectives' testimony was reliable where "it
14 came from their own observations, from other law enforcement agencies and was corroborated by
15 other witnesses and documentary evidence").

16 The letters at issue here lack these critical indicia of reliability. Unlike in *Donahoe*, the
17 authors of the letters largely lack personal knowledge, direct observation, and corroboration.
18 Moreover, even those letters that assert personal knowledge, they lack the indicia of reliability
19 that is required at sentencing. To take just one example, the letter from Michele LaFortune lists,
20 among things that she "saw and experienced," a "[h]uge argument behind doors with Gempo
21 Roshi by letting James know it was illegal to use subliminal for sale purpose." Setting aside
22 the irrelevance of this assertion to any mitigating circumstance, the letter fails to explain when
23 and how Ms. LaFortune observed this "behind-doors" argument, which the Defense believes
24 never occurred. This letter, like the others the State has disclosed, lack the markers of reliability
25 required under the Due Process Clause and Arizona case law.

26 **II. CONCLUSION**

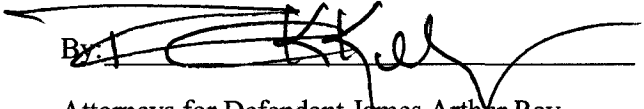
27 The Court must limit the evidence to be introduced at the upcoming pre-sentencing
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1 hearing to evidence that is relevant to the mitigating circumstances at issue; that is reliable; and
2 that is not unduly prejudicial. The letters the State has disclosed do not meet these standards and
3 should be excluded.

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5 DATED: September 19, 2011


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10 By: 
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12 Copy of the foregoing delivered this 19 day
13 of September, 2011, to:

14 Sheila Polk
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